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Attorney for Plaintiff, JAMES M. KINDER, an individual

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JAMES M. KINDER,

Plaintiff,

v.

HARRAH'S ENTERTAINMENT, Inc.;
HARRAH'S OPERATING COMPANY,
Inc.; HARRAH'S MARKETING
SERVICES CORPORATION; HARRAH'S
LICENSE COMPANY, LLC; HARRAH'S
LAUGHLIN, Inc.; HBR REALTY
COMPANY, Inc. and DOES 1 through 100,
inclusive,

Defendants.

Case No. 07 CV 2132 DMS (AJB)
[Consolidated with 07CV2226 DMS (AJB)]

Judge: Hon. Dana M. Sabraw
Mag. Judge: Hon. Anthony J. Battaglia

**OBJECTIONS AND MOTIONS TO
STRIKE EVIDENCE SUBMITTED
BY DEFENDANTS IN SUPPORT OF
THEIR MOTION TO DISMISS**

Date: April 25, 2008
Time: 1:30 p.m.
Courtroom: 10

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD: Plaintiff
JAMES M. KINDER hereby submits the following objections and motions to strike evidence
submitted by Defendants in support of their Motion to Dismiss.

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1 **1. Declaration Of Michael Kostrinsky, Paragraph 2:**

2 Paragraph 2 of the Declaration of Michael Kostrinsky states:

3 “*Specially Appearing* Defendant Harrah’s Entertainment, Inc. is a Delaware
 4 corporation, headquartered in Las Vegas, Nevada. It does not have offices in
 5 California; does not own property in California; does not have employees in
 6 California; and, does not conduct business in California. *Specially Appearing*
 7 Defendant Harrah’s Entertainment, Inc. does not make telemarketing or other
 8 telephone calls to individuals in California using an automatic telephone dialing
 9 system, artificial or prerecorded voice, **or otherwise.**”
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11 **Grounds For Objection:**

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 13 Each and every factual statement in this paragraph lacks foundation and therefore this
 14 paragraph should be stricken in its entirety. Although Mr. Kostrinsky claims in Paragraph 1 of
 15 his Declaration to be the “Chief Litigation Officer for Harrah’s Operating Company, Inc.,” he
 16 does not say how this fact alone gives him any *personal* knowledge of the inner-workings,
 17 property holdings, employment records, etc., of each and every entity Plaintiff has named as a
 18 Defendant. Moreover, he cites to no specific facts or documents whatsoever, such as corporate
 19 charter documents, Secretary of State filings, employment records, phone records, contracts with
 20 telemarketing firms, or any type of documentary evidence at all, from which he allegedly draws
 21 any of this knowledge. Therefore, this entire paragraph is without foundation and conclusory.
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 25 Moreover, Mr. Kostrinsky’s statement that “Harrah’s Entertainment, Inc. does not make
 26 telemarketing or other telephone calls to individuals in California using an automatic telephone
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dialing system, artificial or prerecorded voice, **or otherwise**" [bold added] is a legal conclusion and should also be stricken. Finally, given that Mr. Kostrinsky says that no one from any of the Harrah's entities has ever so much as picked up a hand set and called a California telephone number, which is entirely ridiculous, his credibility is highly questionable. In addition to the fact that this statement is so obviously not true, it makes no practical sense. How could one person possibly know the day to day job duties of every person working for the sundry Harrah's entities, which employ thousands of people? Even if Mr. Kostrinsky does possess such omniscience, he has not told the court how he acquired any of this knowledge. All that Plaintiff and the court have to go by in evaluating the declaration is that Mr. Kostrinsky is a *lawyer for the Defendant*, whose job necessarily depends on getting Defendant out of legal jams, such as the instant action.

2. Declaration Of Michael Kostrinsky, Paragraph 3:

Paragraph 2 of the Declaration of Michael Kostrinsky states:

"Harrah's Operating Company, Inc. is a Delaware corporation and is not headquartered in California. It does not have offices in California; does not own property in California; does not have employees in California; and; does not conduct business in California; Harrah's Marketing Services Corporation is a foreign; is not headquartered in California; and does not own property in California; Harrah's License Company, LLC is a foreign company and is not headquartered in California; It does not have offices in California; does not own property in California; does not have employees in California; and, does not conduct business in California. Harrah's Laughlin, Inc. is a foreign corporation and is not headquartered in California. It does not have offices in California; does

1 not own property in California; does not have employees in California; and, does
2 not conduct business in California. And, HBR Realty Company, Inc. is a foreign
3 corporation and is not headquartered in California. It does not have offices in
4 California; does not own property in California; does not have employees in
5 California; and, does not conduct business in California.”
6

7 **Grounds For Objection:**

8 Each and every factual statement in this paragraph lacks foundation and therefore this
9 paragraph should be stricken in its entirety. Although Mr. Kostrinsky claims in Paragraph 1 of
10 his Declaration to be the “Chief Litigation Officer for Harrah’s Operating Company, Inc.,” he
11 does not say how this fact alone gives him any *personal* knowledge of the inner-workings,
12 property holdings, employment records, etc., of each and every entity Plaintiff has named as a
13 Defendant. Moreover, he cites to no specific facts or documents whatsoever, such as corporate
14 charter documents, Secretary of State filings, employment records, phone records, contracts with
15 telemarketing firms, or any type of documentary evidence at all, from which he allegedly draws
16 any of this knowledge. Therefore, this entire paragraph is without foundation and conclusory.
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20 As discussed above, given that Mr. Kostrinsky says in Paragraph 2 of his Declaration that
21 no one from any of the Harrah’s entities has ever so much as picked up a hand set and called a
22 California telephone number, which is entirely ridiculous, his credibility is highly questionable.
23 In addition to the fact that this statement is so obviously not true, it makes no practical sense.
24 How could one person possibly know the day to day job duties of every person working for the
25 sundry Harrah’s entities, which employ thousands of people? Even if Mr. Kostrinsky does
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1 possess such omniscience, he has not told the court how he acquired any of this knowledge. All
 2 that Plaintiff and the court have to go by in evaluating the declaration is that Mr. Kostrinsky is a
 3 *lawyer for the Defendant*, whose job necessarily depends on getting Defendant out of legal jams,
 4 such as the instant action.

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 7 Moreover, Harrah's Marketing Services Corporation and Harrah's Operating Company,
 8 Inc. have designated agents for service of process on file with the California Secretary of State.
 9 They have *consented to suit* in the State of California and are therefore subject to *general*
 10 jurisdiction here.

11 **3. Exhibit 2:**

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 13 Defendant has attached as Exhibit 2 a list purportedly created by the Judicial Council of
 14 California and purportedly proving that Plaintiff is a vexatious litigant.

15 16 **Grounds for Objection:**

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 18 These documents should be stricken because they are hearsay, irrelevant, lacking in
 19 foundation and have not been authenticated. Furthermore, as the "facts" therein are not properly
 20 subject to judicial notice, nor has any request for judicial notice of these documents been made
 21 by Defendant, these documents are not good evidence and should be stricken. While the
 22 existence of a document in a court file may be judicially noticed, the truth of matters asserted in
 23 such documents is not subject to judicial notice. *Sosinsky v. Grant*, (1992) 6 Cal.App.4th 1548.
 24 "A court *cannot* take judicial notice of the truth of *hearsay* statements just because they are part
 25 of a court record or file." *Bach v. McNelis* (1989) 207 Cal.App.3d 852, 865 [Emphasis in
 26

1 original.]. The court may take judicial notice of the existence of other court records and files, but
2 cannot accept findings of fact contained in those files as true. *See The Rutter Group, Civil*
3 *Procedure Before Trial § 7:12-7:15.10.*

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6 **4. Exhibit 3:**

7 Defendant has attached as Exhibit 3 a copy of a declaration allegedly submitted by
8 Plaintiff in a Telephone Consumer Protection Act filing in San Diego Superior Court.

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10 **Grounds for Objection:**

11 This document should be stricken because it is hearsay, irrelevant, lacking in foundation
12 and has not been authenticated. Furthermore, as the “facts” therein are not properly subject to
13 judicial notice, nor has any request for judicial notice of these documents been made by
14 Defendant, these documents are not good evidence and should be stricken. While the existence
15 of a document in a court file may be judicially noticed, the truth of matters asserted in such
16 documents is not subject to judicial notice. *Sosinsky v. Grant*, (1992) 6 Cal.App.4th 1548. “A
17 court *cannot* take judicial notice of the truth of *hearsay* statements just because they are part of a
18 court record or file.” *Bach v. McNelis* (1989) 207 Cal.App.3d 852, 865 [Emphasis in original.].
19 The court may take judicial notice of the existence of other court records and files, but cannot
20 accept findings of fact contained in those files as true. *See The Rutter Group, Civil Procedure*
21 *Before Trial § 7:12-7:15.10.*

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1 **5. Exhibit 4:**

2 Defendant has attached as Exhibit 4 a document purportedly reflecting the San Diego
3 Superior Court docket in *James M. Kinder v. Harrah's Entertainment, Inc.* 37-2007-00076114-
4 CU-MC-CTL.

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7 **Grounds for Objection:**

8 This document should be stricken because it is hearsay, irrelevant, lacking in foundation
9 and has not been authenticated. Furthermore, as the "facts" therein are not properly subject to
10 judicial notice, nor has any request for judicial notice of these documents been made by
11 Defendant, these documents are not good evidence and should be stricken. While the existence
12 of a document in a court file may be judicially noticed, the truth of matters asserted in such
13 documents is not subject to judicial notice. *Sosinsky v. Grant*, (1992) 6 Cal.App.4th 1548. "A
14 court *cannot* take judicial notice of the truth of *hearsay* statements just because they are part of a
15 court record or file." *Bach v. McNelis* (1989) 207 Cal.App.3d 852, 865 [Emphasis in original.].
16 The court may take judicial notice of the existence of other court records and files, but cannot
17 accept findings of fact contained in those files as true. See The Rutter Group, Civil Procedure
18 Before Trial § 7:12-7:15.10.

19 DATED: April 11, 2008

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22 By: /s/ Chad Austin
23 CHAD AUSTIN, Esq., Attorney for
24 Plaintiff, JAMES M. KINDER
25 Email: chadaustin@cox.net
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